here with effect from January 10, 1976. Now the Privy Council has ruled that was the wrong test to be applied and the Federal Court had adopted the test expounded by the Privy Council in the case of *A. Ragunathan* v. *Pendakwa Raya (supra).* In the High Court I am bound by the ruling of the Federal Court.

Applying this test to the case under appeal I am constrained to hold that the President of the Sessions Courts had applied the wrong test. At the close of the prosecution case the test of a *prima facie* case is not "Has the prosecution evidence established the case against the accused beyond a reasonable doubt?" but rather "If I were to accept the prosecution evidence as accurate would it establish the case against the accused beyond a reasonable doubt?"

Without going into details the salient points given by the complainant, Rebuyah binti Chie (P.W.6) are these:

(a) The accused is her brother-in-law. Both the accused and his wife live in the same house as the complainant and her parents.

(b) On the night of May 27, 1981 the complainant went to bed wearing a long-pants and baju-kurong. Her panty was on. The accused entered her bedroom.

(c) She alleged that the accused pulled down her longpants and panty. After pulling off his underpants the accused laid on top of her and tried to have sexual intercourse with her against her will. Accused placed a pillow on her mouth to prevent her from shouting. She struggled by using her legs to kick her bed. She felt that the accused's private part was about to enter her private part on a number of times.

(d) Because of the noise the father of the complainant went to investigate and found the accused in complainant's room wearing only an underpant.

(e) The complainant was subsequently examined by a doctor who found some bruises surrounding the lower part of the hymen. The doctor also found she has an extra globe below the clitoris thereby obstructing her vagina. Smears and swabs were taken and the doctor discovered spermotozoa present.

In a charge of attempted rape the essential ingredients which constitute the charge are:—

(a) attempted sexual intercourse and

(b) without the consent of the complainant.

The complainant was about fifteen years of age at the time of the alleged offence and her testimony is simple and straightforward. Her evidence cannot be said to be so inherently incredible as to be incapable of belief by a reasonable person, having regard to the evidence of the doctor. Besides the essential elements are not lacking and the accused was found in her bedroom wearing only an underpant and at an unearthly hour. Applying the test expounded by Raja Azlan Shah Ag. L.P. in *A. Ragunathan case* I am constrained to rule that a *prima facie* case had been made out by the prosecution evidence which if unrebutted would warrant the conviction of the accused as charged. I therefore set aside the order of discharge and acquittal and order the President of the Sessions Court, Kuching to call upon the accused to enter upon his defence.

The appeal is therefore allowed.

Appeal allowed.

ONGKONG ANAK SALLEH v. DAVID PANGGAU SANDIN & ANOR.

[O.C.J. (Seah J.) September 24, 1982]
[Kuching – Originating Motion No. MR 1 of 1982]

Administrative Law – Application for order that Native Court hear and determine application – Meaning of "court subordinate to the High Court" – Whether native court is a court subordinate to the High Court – Native Courts Ordinance – Subordinate Courts Act, 1948 – Specific Relief Act 1950, section. 44 – Federal Constitution, Article 74.

Jurisdiction- District Native Court – Not subordinate to High Court – High Court has no supervisory powers over it.

In this case the applicant applied for an order under section 44 of the Specific Relief Act, 1950, that the District Native Court do hear and determine the application of the applicant for extension of time to lodge an appeal.

Held: (1) the District Native Court is not a court subordinate to the High Court and the High Court does not exercise supervisory power over it;

(2) the High Court has therefor no jurisdiction to entertain the motion of the applicant.

Case referred to:

(1) *G.H. Slot & Co Ltd.* v. *Registrar of Trade Marks, S.S.* [1939] M.L.J. Rep. @ p. 213; [1939] M.L.J. 276.

CIVIL SUIT.

Makandar Singh Sandhu for the applicant.

Dennis Ong Jiew Fook (Assistant State Attorney-General, Sarawak) for the 1st respondent.

John Antau for the 2nd respondent.

Cur. Adv. Vult.

Seah J.:– By this Notice of Originating Motion the applicant, Ongkong anak Salleh prays for an Order pursuant to section 44 of the Specific Relief Act 1950 (revised 1974) that the District Native Court do hear and determine the application made by the said Applicant under section 7(3) of the Native Courts Ordinance (Cap. 43) for extension of time to lodge an appeal against the decision of the Bintulu Native Officer's Court in Native Officer's Court Case No. 1/76. The application is supported by various affidavits affirmed by the applicant and his advocate Mr. Sandhu.

The two respondents named herein are David Panggau Sandin (1st respondent) who is being sued in his capacity as presiding Magistrate of the District Native Court and Tanggong anak Sain, the former wife of the applicant (the 2nd respondent). Both these respondents opposed the application. At the hearing Mr. Sandhu appeared for the applicant; Mr. Denis Ong, the learned Assistant State Attorney-General acted for the 1st respondent and Mr. John Antau represented the 2nd respondent.

Section 44 of the Specific Relief Act 1950 reads:

44(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or temporary nature, or by any corporation or any court subordinate to the High Courts: Provided that –

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

Nothing in this section shall be deemed to authorise a Judge –

(a) to make any order binding on the Yang di-Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force."

Section 49 provides that "neither the High Court nor any other court in Malaysia shall hereafter issue any writ of Mandamus".

In my view, sections 44 to 49 of the Specific Relief Act 1950 (Revised 1974) are in substance a codification of the English law of Mandamus in relation to public duties but instead of ordering the writ of Mandamus to issue the High Court makes an order requiring the act to be done (per McElwaine C.J. in *G.H. Slot & Co. Ltd.* v. *The Registrar of Trade Marks S.S.*[1])

Now, what does the phrase "any court subordinate to the High Court" mean?

(i) Article 121(1) of the Federal Constitution provides that

"Subject to clause 2 the judicial power of the Federation shall be vested in 2 High Courts of co-ordinate jurisdiction and status, namely –

(a) one in the States of Malaya which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(b) one in the States of Sabah and Sarawak which shall be known as the High Court in Borneo and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

and in such inferior courts as may be provided by federal law."

For the purpose of this application clause 2 is not relevant to this proceeding;

Section 25 of the Courts of Judicature Act 1964 reads:

25(1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in

the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule: Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

Clause 1 of the Additional Powers of the High Court reads:

"Power to issue to any person or authority directions, orders or writs, including writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose."

The preamble to the Prerogative Remedies Ordinance (Cap. 47) reads:

"An Ordinance to provide for prerogative remedies and for matters incidental thereto and connected therewith"

and section 3 provides that

"It is hereby declared that proceedings by way of Habeas Corpus and Subjiciendum, Mandamus, Prohibition and Certiorari shall be available in Sarawak, and shall be deemed always to have been available in Sarawak, since the 1st day of January 1957, to the same extent and for the like objects and purposes as they may, from time to time, be available in England."

But this Ordinance was repealed vide P.U.(A) No. 97/76.

(ii) On the other hand the preamble to the Native Courts Ordinance (Cap.43) reads:

"An Ordinance to make better provision for the constitution of Native Courts; the definition of their powers and jurisdiction; and all matters ancillary thereto."

Under the Native Courts Ordinance the following courts have been constituted, viz:

(a) Headman's Court;
(b) Native Officer's or Chef's Court;
(c) District Native Court and
(d) Resident's Native Court.

From the Resident's Native Court an appeal shall be by way of Case Stated on a point of law or native custom to the Native Court of Appeal presided over by one or more Judges of the High Court and assessors whom the Yang di-Pertua Negeri is satisfied to have expert knowledge of native customary laws relevant to the determination of the appeal (see section 8). The Native Court of Appeal shall have the same powers as may from time to time be vested in the High Court (see section 9(2).

The jurisdiction of the Native Courts is limited to trying cases rising from breaches of native law or custom in which all the parties are subject to the same native system of personal law relating to religious, matrimonial or sexual matters including land disputes where no land title has been issued by the Land Office and where the value of the subject matter does not exceed fifty dollars (see section 5). And section 7(4) provides, *inter alia,* that every court exercising powers of appeal or revision under this Ordinance shall decide all matters according to substantial justice without undue regard to technicalities.

(iii) Article 74 of the Federal Constitution reads:

74(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

It is common ground that the Subordinate Courts Act 1948 is an ordinance enacted by the Federal Parliament and this Act (as amended) has been extended to Sabah and Sarawak with effect from June 1, 1981.

Under this Act the subordinate courts set up to administer the civil and criminal law in Sabah and Sarawak are (a) Sessions Courts and (b) Magistrates' Courts. Section 3 of the Courts of Judicature Act 1964 defines a "subordinate court" to mean any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court and means in

relation to the High Court any such Court as by any written law has jurisdiction within the local jurisidiction of the High Court.

The Native Courts are purely a creature of statute, viz. the Native Courts Ordinance (Cap. 43); their jurisdiction is clearly defined by the legislature and the powers of the courts are strictly limited. In short, the Native Courts including the District Native Court are statutory courts established not by federal law but by Sarawak State law. They administer a system of laws entirely different from that of the High Court and the subordinate courts in Sarawak. There is no right of appeal from a decision of the District Native Court to the High Court but under section 8(1)(c) of the Native Courts Ordinance an appeal lay to the Resident's Native Court which shall be constituted by a person for the time being holding or acting in the office of Resident of a division sitting with a Native Officer or Chief and two assessors, being persons whom the Resident has reason to believe are versed in the customary law relevant to the determination of the appeal. Subject to subsections (3) and (4) thereof an appeal by way of case stated on a point of law or native custom lay from the President's Native Court to the Native Court of Appeal presided by a Judge of the High Court nominated by the Yang di-Pertua Negeri.

The phrase "any court subordinate to the High Court" contained in section 44(1) of the Specific Relief Act 1950 is of course different from the expression "subordinate court" as defined in section 3 of the Courts of Judicature Act 1964. In my opinion, a court cannot be said to be subordinate to the High Court unless the High Court exercises supervisory power over it. Moreover, the District Native Court is constituted under the Native Courts Ordinance (Cap. 43) a state law enacted by the legislature of Sarawak and the High Court has no supervisory power over it. Besides, an appeal from a decision of the District Native Court does not lie to the High Court but to the Resident's Native Court.

For the above reasons I am inclined to agree with the submission of the learned the Assistant Attorney-General of Sarawak that the High Court has no jurisdiction to entertain this motion of the applicant. I therefore dismiss the Notice of Motion with costs to the 1st respondent only to be taxed. I make no order for costs in favour of the 2nd respondent.

Notice of motion dismissed.

Solicitors: *Sandhu & Co.; Tang & Antau.*

TENGKU ABDUL MUIZ SHAH & ORS. v. PUBLIC PROSECUTOR.

[O. Cr. J. (Mohamed Dzaiddin J.) November 30, 1982]

[Kuala Lumpur – Criminal Application No. 16 of 1982]

Criminal Law & Procedure – Application to transfer criminal case pending in Johore Baru Magistrate's Court to Magistrate's Court in Kuala Lumpur – Jurisdiction – Whether High Court at Kuala Lumpur had jurisdiction to hear application – The Federal Constitution, arts. 121, 122A, 122B, 122C, 123 & 126 – Courts of Judicature Act 1964, ss. 3, 22(1)(a)(i), 26 & 31 – Criminal Procedure Code, s. 417 – Subordinate Courts Act 1948.

Jurisdiction – "Local jurisdiction" of the respective High Courts at Johore Baru and Kuala Lumpur.

This is an application by the applicants for a transfer of a criminal case pending in the Johore Baru Magistrate's Court to the Magistrate's Court, Kuala Lumpur. The respondent objected to the said application on 2 grounds, viz., that the High Court at Kuala Lumpur has no jurisdiction to hear the application, and even if it has, the High Court is still not empowered under section 417 of the Criminal Procedure Code to make an order for transfer.

Held: (1) since the offence was alleged to have been committed at Johore Baru within the territorial jurisdiction of the Johore Baru Magistrate's Court, and the High Court at Johore Baru has the local jurisdiction for the State of Johore, it follows that the Johore Baru High Court is the court of competent jurisdiction to hear this application;

(2) the present application should therefor be filed before the High Court in Johore Baru and it will be in the power of that court, if it so decides, to transfer the case to Kuala Lumpur Magistrate's Court.

CRIMINAL APPLICATION.

Karpal Singh (*Abbas Rowland* with him) for the applicants.

Mokhtar Abdullah (Deputy Public Prosecutor) for the respondent.

Mohamed Dzaiddin J.: This is an application by the applicants for a transfer of a criminal case pending in the Johore Baru Magistrate's Court to the Magistrate's Court, Kuala Lumpur. Two